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No. 90-1764

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INDEPENDENT FRUIT AND PRODUCE COMPANY, *et al.*,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly determined that employers are bound by the unambiguous written provisions of their collective bargaining agreements to make contributions to a pension plan on behalf of certain employees notwithstanding the employers' assertions that the collective bargaining parties had an unwritten understanding that was not disclosed to the pension plan to apply an unconventional meaning to one of the contract terms that would defeat the contribution obligation on behalf of those employees in violation of the pension plan's trust agreement.

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STATEMENT OF THE CASE

The Central States, Southeast and Southwest Areas Pension Fund ("Central States") and one of its trustees, Howard McDougall, brought this action under Section 515 of ERISA, 29 U.S.C. § 1145, to collect contributions due the pension plan from petitioners and others under their collective bargaining agreements to make contributions on behalf of their employees for pension benefits. Under the agreement contributions were due on bargaining unit employees but were not due on "casuals." This action was brought when, following an audit, Central States determined that certain long-time employees were work-

ing full time but were not being reported as plan participants, and no contributions were made on their behalf, because the employers categorized them as casuals.

The employers responded that the union and they had agreed on a special meaning for the term "casual" and that it meant whomever they so designated. This special meaning was not conveyed to Central States. Moreover, such a meaning would have violated Central State's plan and trust that prohibit splitting a bargaining unit (some employees covered and some not covered). The employers asserted that Central States was bound by the collective bargaining "usage" of the term whether disclosed or not. The district court agreed.

The United States Court of Appeals for the Eighth Circuit reversed the district court. The court referred to *Black's Law Dictionary* (5 ed. 1979) for the definition of "casual employment." The definition was clear, relating the term to temporary, irregular or incidental employment, and was completely at odds with the asserted usage of the collective bargaining parties. The dictionary definition was consistent with the collective bargaining parties original usage of the term, with the language of pre-1982 collective bargaining agreements, and with Central States' understanding of the term. See opinion below, 919 F.2d at 1350 (Appendix at A50). Applying a basic rule of contract interpretation, the court held the employers bound by the ordinary meaning of this unambiguous term. The court also held that a pension plan may not, under ERISA, be bound by an unwritten, unconventional definition of a term that would defeat the pension plan's obligation to collect contributions on behalf of its participants.

REASONS FOR DENYING THE WRIT

Petitioners cite as sole ground for this Court to issue a writ of certiorari that the decision of the court of appeals "conflicts with an unbroken string of decisions

of this Court" regarding interpreting contracts between collective bargaining parties. Petition at 17 (hereinafter cited "Pet. at ——"). As we show below, petitioners' conflict is illusory. The court of appeals decision is entirely consistent with applicable decisions of the Court. Respondent Central States is a pension plan—not a collective bargaining party—that is bound by the terms of a separate trust document under which it may agree to provide pension benefits in accordance with the trust agreement, and that is not bound to the undisclosed meaning ascribed to standard terms by collective bargaining agreement parties that conflict with the terms of the trust.

While not citing it as a ground for this Court's review, petitioners also suggest that the court of appeals incorrectly decided an important question of federal law by placing collective bargaining agreements in jeopardy of being "judicially rewritten to the detriment of institutionalized collective bargaining and labor peace." *Id.* Petitioners are wrong. Collective bargaining agreements are in no danger of being judicially rewritten. The court of appeals only ruled that a third party pension plan that is induced to rely on such agreements is not bound by an undisclosed understanding of the collective bargaining parties to apply a non-standard definition to a commonly understood word. This decision is entirely consistent with applicable decisions of other courts of appeals (and conflicts with none). Thus there is no important question of federal law nor conflict among the courts for this Court to settle.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH NO DECISION OF THIS COURT

Petitioners cannot really point to any particular decision of this Court with which the court of appeals decision directly conflicts. Thus, petitioners allege only in general terms that the court of appeals "fails to follow

the principles of labor contract interpretation." Pet. at 19 (heading). The principle supposedly set out in a stream of decisions from *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) to *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948 (1989), that petitioners seek to uphold is that "foremost importance be given to the parties' intentions." Pet. at 19. But what petitioners really mean is that contracts be construed to give overriding effect to the unwritten, subjective intentions of the parties. Thus, petitioners argue, since the court of appeals applied the commonly accepted, dictionary definition of the term "casual" to the contract instead of the parties unwritten special definition of the term, the court failed to implement the intent of the parties. But this Court has never held that the subjective intent of contracting parties should override the express terms of a contract—especially insofar as the contract implicates the rights and obligations of third parties, such as Central States, who were not privy to the special meaning of the term and relied instead on the common definition.

Petitioners' cases, beginning with *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), do not stand for the proposition cited by petitioners. In *Steelworkers*, this Court ruled on the importance of the labor arbitrator who "performs functions which are not normal to the courts," and who is part of the system of collective bargaining self-government. *Id.*, at 581. "The labor arbitrator's source of law is not confined to the express provisions of the contract. . . ." *Id.* Petitioners' reliance on that case is thus quite misplaced. No labor arbitration is implicated here, nor is there a collective bargaining dispute. Thus, there is no need for special deference to the process at the expense of ordinary principles of construction of a contract. *See, Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371-72 (1984). The *Steelworkers* case provides no principle mandating that courts *must* look

beyond the express terms of a contract. The case simply has no application to interpreting a contract's meaning to a third party pension plan.

Likewise, *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948 (1989), the last case of petitioners "unbroken string," also provides no support to petitioners' position. In *Firestone*, this Court stated, "[a]s they do with contractual provisions, courts construe terms in trust agreements without deferring to either party's interpretation." 109 S. Ct. at 955. This is a far cry from petitioners' cited proposition that "the parties' intention is the goal of contract interpretation whether the rights of a pension plan or other parties are affected." Pet. at 30. *Firestone* held only that in certain circumstances the courts review trustees' plan interpretations *de novo* by looking to the terms of the plan and other manifestations of the parties' intent. In plans like Central States, however, the courts defer to trustee interpretations unless they are arbitrary and capricious. 109 S. Ct. at 954 (citing *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568 (1985)). But *Firestone* does not address any special standard for reviewing a collective bargaining agreement—especially as it affects a third party pension plan. The court of appeals violated no principle of *Firestone* by applying the usual rules of construction to the contract. Finding no ambiguity in the contract term "casual" the court simply found no need to explore the parol intentions of the parties to the detriment of a third party pension plan.

The cases in between *Steelworkers* and *Firestone* are no different and enunciate no general principle applicable here. In *Transportation-Communications Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157 (1966), this Court held it necessary that the National Railroad Adjustment Board exercise its jurisdiction over a dispute involving two collective bargaining agreements by looking at both contracts, even though the union party to one

contract declined to participate, because the interpretation of one contract affected the other. The case does not suggest that the Board or courts look beyond the confines of the two agreements. But even if the Board could look beyond the express terms, it seems highly unlikely that it (or this Court) would rule that an unwritten, unconventional definition purportedly used by the parties to one agreement would override the express terms of the second to the detriment of the party not in privity to the first agreement. Likewise petitioners' collective bargaining understanding may not override respondents' trust agreement.

In *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430, 87 S. Ct. 559, 565 (1967), this Court held only that the NLRB had power to interpret a disputed collective bargaining agreement to determine whether a violation of the NLRA (not the contract) had occurred. The case does not hold that the NLRB (or a court) *must* look to the subjective intent of the parties. It only notes that the NLRB did look at the history of negotiations to determine whether the Act was violated, and the Court could not say that the NLRB was wrong to do so. *Id.* Not before the Court in that case was the applicability of the contract to third parties. Thus, no principle of that case was violated by the court of appeals here that found it unnecessary to look beyond the confines of the agreement with regard to its applicability to Central States.

Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984), especially does not support any principle of overriding subjective intent. While in *Schneider* this Court referred to the parties' intent, it sought that intent within the confines of the contract. Indeed *Schneider* underscores a key distinction of this case that petitioners overlook. This Court noted in *Schneider* that the benefit funds were separate from the collective bargaining parties and thus the Court looked first to the *trust* agreement for evidence of the intent of *parties to the trust* to

arbitrate. *Id.* at 374. Finding no such evidence in the trust, the Court considered *arguendo* whether the collective bargaining parties had shown such intent in that agreement, and found none. *Id.* The Court never suggested that the collective bargaining agreement might override the trust. Since neither trust nor contract showed evidence of any intent to require arbitration, the inquiry ceased.

In sum, the cases relied upon by petitioners generally sought to ascertain the intent of the contracting parties within the confines of the written agreement. The only cases suggesting that the deciding body look outside the agreement relied on the special relationships of labor boards and labor arbitrators to the collective bargaining process, a relationship not applicable here. The only case remotely similar to the instant case is *Schneider* that limited its review of the parties' intent to the written documents, and that noted the special posture of the pension plan as an entity distinct from the collective bargaining parties and primarily controlled by the trust document. There the intent of the settlors of the trust, not the collective bargaining parties, was paramount.

II. THE COURT OF APPEALS DECISION IS CONSISTENT WITH OTHER DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND PRESENTS NO IMPORTANT FEDERAL QUESTION FOR THIS COURT TO SETTLE

Petitioners correctly observe the major flaw in their position provided by *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). There this Court held that defenses the collective bargaining parties might assert against each other were not necessarily defenses against a pension plan seeking to assert its own rights under the contract. No more should the parties be allowed to assert a special understanding of the meaning of the contract.

As argued above, the court of appeals was correct in relying on the terms of the contract itself and not the parties' unwritten, non-standard understandings. That being a sufficient ground for the decision, the court did not address the *Benedict* line of cases (that had been briefed to it). But if the court of appeals had given cognizance to the collective bargaining parties understanding, it would have been obligated to render that understanding ineffective to the extent it conflicts with the trust agreement of a third party pension plan. The courts of appeals are in full accord. An unwritten side agreement would violate Section 302(c)(5) of the Labor Management Relations Act. 29 U.S.C. § 186(c)(5). See, e.g., *Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (*en banc*); *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986); *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968). The parties' unconventional use of the term "casual" rises to the level of an unwritten agreement to employ the term specially.[1]

In 1980 Congress provided additional protection to pension plans by enacting Section 515 of ERISA, 29 U.S.C. § 1145. The congressional sponsors indicated, "we endorse judicial decisions such as *Lewis v. Benedict Coal. . . .*" *Gerber*, 870 F.2d at 1153 (citing 126 Cong. Rec. 23039 and 23288). In *Gerber* the Seventh Circuit had occasion to consider the effect of a secret side agreement on a pension plan under Section 515. The plan in *Gerber* (the same plan as respondent Central States) provided a prohibition against splitting a collective bargaining unit. 870 F.2d at 1155 and note 4. The court held that an undis-

[1] Petitioners admit that originally the parties used the term "casual" in its common sense to mean employees necessary "to level labor demands which were 'irregular and unpredictable.'" Pet. at 15. Over time the use of the term evolved, apparently, to the unconventional meaning they now espouse. Of course no one told Central States who might have objected or refused to cover the bargaining unit because of the conflict with the terms of the trust.

closed (to the pension plan) agreement to split a unit must give way to the mandate of Section 515 of ERISA that the pension plan enforce the written obligation to contribute. The other courts of appeals are in full accord. *See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Behnke*, 883 F.2d 454, 459-61 (6th Cir. 1989); *Bituminous Coal Operators' Ass'n, Inc. v. Connors*, 867 F.2d 625, 633-35 (D.C. Cir. 1989); *Pierce County Hotel Employees Trust v. Elks Lodge*, 827 F.2d 1324, 1328 (9th Cir. 1987). Petitioners' unwritten understanding had the effect of splitting the bargaining unit into casuals and non-casuals in a manner contrary to the trust. Petitioners, like Gerber, could have anticipated that had they approached the Central States with their real intent, "the funds would have replied 'No.'" *Gerber*, 870 F.2d at 1155. Had the pension plan known of the unconventional definition it might have rejected the employer's participation or required a modification. By the parties' employing, and not disclosing, the unconventional meaning of the term, Central States was denied the opportunity to enforce the trust as to that meaning. Now it is too late and Central States must enforce Section 515.

In an apparent attempt to show that Central States should have been more vigilant regarding potential deviant meanings of the term, petitioners have provided in their appendix a study purporting to show the many uses and meanings collective bargaining parties put to the term "casual." What is striking about this study, however, is the implicit (and sometimes explicit) acceptance of the dictionary definition of the term such that when the parties deviate from the conventional definition, they explain the deviation in some detail in the contract itself. The study thus completely undercuts petitioners' position that they could rely on an unwritten, special definition of the term.

Since petitioners did not set forth their meaning in the contract, the court of appeals had no contract term to re-

write. There is absolutely no suggestion in the decision that courts might rewrite a contract, but only that they enforce its express terms. As the court of appeals noted, "we merely reaffirm a basic rule of contract interpretation. 'A signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one; private intent counts only if it is conveyed to the other party and shared.' " 919 F.2d at 1353 (citing *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988)). Accordingly, there is no serious federal question for this Court to resolve. The question is already resolved against petitioners' position by all courts to consider it.

CONCLUSION

For the foregoing reasons, respondents submit that the petition for a writ of certiorari be denied.

Respectfully submitted,

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